SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1873.

No. 106.

SPENCER TRASK, APPELLANT,

vs.

CONSTANTINE MAGUIRE, THE ST. LOUIS AND IRON MOUNTAIN RAILROAD COMPANY AND OTHERS, RESPONDENTS.

STATEMENT AND BRIEF OF APPELLANT'S COUNSEL,

DRYDEN & DRYDEN,

For Appellant.

Ahner, Menning & Co., Prs., 211 Market st.

UNITED STATES OF AMERICA,
IN THE U. S. SUPREME COURT,
OCTOBER TERM, 1873.

SPENCER TRASK, APPELLANT,
vs.
CONSTANTINE MAGUIRE,
THE ST. LOUIS & IRON MOUNTAIN R. R. CO.
AND OTHERS, RESPONDENTS.

APPEAL

From the United States Circuit Court for the District of Missouri.

Statement of the Case by Counsel for the Appellant, and adopted by Counsel for Respondents.

This is a Bill on Equity brought by Trask, the appellant, a citizen of the State of New York, and a stockholder in the St. Louis and Iron Mountain Railroad Company, incorporated July 26th 1867, against said Railroad Company and its Directors, and Constantine Maguire, collector of State and County taxes for the County of St. Louis in the State of Missouri, respondents.

The object of the bill is to have the property and capital stock of said Railroad Company in Missouri declared exempt from liability to taxation for State and County purposes, and

to perpetually enjoin the respondent Maguire from selling certain locomotive engines, tenders and cars of the said Railroad Company, which he had seized and was about to sell to enforce payment of certain State and County taxes, claimed to be due from said Railroad Company.

The bill shows that there have been two Railroad corporations in Missouri, bearing the name of "The St. Louis and Iron Mountain Railroad Company," the second succeeding the first in the possession and ownership of the road and property of the first. The first was duly organized under and pursuant to a special act of the General Assembly of that State, entitled, "An Act to incorporate the St. Louis and Iron Mountain Railroad Company," approved March 3rd 1851. The second and now acting company was organized the 26th of July 1867, by the corporators filing articles of association in the office of Secretary of State, pursuant to the provisions of an act of the General Assembly of said State, entitled "An Act authorizing the incorporation of the purchaser or purchasers of any railroad, or of any part, section, or branch thereof, which has heretofore, or hereafter may become forfeited to, and sold by the State," approved March 20th, 1866. It further appears by said bill that the capital stock of said first company was six millions of dollars, divided into shares of one hundred dollars each, that among other powers, power was given said company "to make and enforce all kinds of contracts," and to "take, hold, use, possess and enjoy the fee simple, or any other title or estate in any lands, tenements or hereditaments, and the same sell and dispose of at pleasure," and "to survey, locate and construct a railroad from any point within the City of St. Louis in said State of Missouri, to the Iron Mountain and Pilot Knob," with liberty to extend the same to the Mississippi River, or to the south-western part of the State. And it further appears by said bill that it was expressly provided in and by the said act of Assembly chartering said first company that "the stock of said company *should be exempt from all State and County taxes*," and that by an act of Assembly amendatory of said charter, approved February 17th, 1853, it was provided that "all the

engines, cars, wagons, machines and other property belonging to said company should be deemed a part of the capital stock of said company, and should be vested in the respective shareholders of the company forever, according to their respective shares, and transferable by them in the transfer of stock as personal property."

It further appears by the bill that said first company within the times limited by its charter, sold to divers persons divers shares of its capital stock, amounting in the aggregate to more than five thousand shares, and received payment therefor, and that *relying upon the rights, privileges, franchises and immunities granted and secured to it by means of said several acts of Assembly*, said company located and commenced the construction of its railroad from the City of St. Louis to the said Pilot Knob, a distance of about eighty-seven miles, and with the proceeds of its stock sold and other available means, said company carried forward to completion the said line of road from St. Louis to Pilot Knob, and a branch road from the main line to Potosi, in Washington County, about four miles long, and secured the right of way for the track of said main line and branch over divers tracts of land, through which said railroad and branch pass, and acquired the title to divers lands needful for side tracks, turnouts, turn-tables, switches, stations, depots, machine-shops and for other purposes, and built thereon divers side tracks, turnouts, turn-tables, switches, stations, depots, machine-shops and other structures necessary for the successful operation of said road, and fully equipped the said road and branch with divers locomotive engines, cars and other needful appliances.

And it further appears by said bill that in the progress of the work of building said railroad, and in order to aid said enterprise, the General Assembly passed divers laws particularly set forth in said bill, by authority of and pursuant to which laws divers bonds of the State of Missouri for the payment by the State of divers large sums of money with interest were issued and delivered to said company ; that prior to the delivery of said bonds to said company, it (the said company)

signified its acceptance thereof to the Secretary of State of said State of Missouri, in the manner and form prescribed by said law, and that by force thereof and by operation of said law it became and was the duty of said railroad company to pay as well the interest as the principal of said bonds, as the same should from time to time become due and payable, and that the said railroad and property of said company, and every part and section thereof, and its appurtenances, by means of said certificates of acceptance and by force of said laws, became and were pledged and mortgaged to said State to secure the payment of the principal and interest by said company on the bonds so issued and delivered to it: and that power was given by said laws to the Governor and made his duty in case of the company's default in the payment of principal or interest on said bonds, to sell said mortgaged premises by auction to the highest bidder, or to buy in the same at such sale for the use and benefit of the State, subject to such disposition of the same as the Legislature might thereafter direct.

And it is further shewn by the bill that said first railroad company made default in the payment of said State bonds; and still continuing in default, said General Assembly passed an act, approved February 19th, 1866, entitled "An Act to provide for the sale of certain railroads and property by the Governor, to foreclose the State-lien thereon, and to secure an early completion of the South-west Branch Pacific, the Platte country, the St. Louis and Iron Mountain and the Cairo and Fulton Railroads of Missouri," and that the Governor, pursuant to the said last named act, and to the several acts imposing said mortgage-lien, thereupon sold the said mortgaged property, at which sale the said State of Missouri became the purchaser thereof, and took possession of the things mortgaged and sold; and that the said State, by and through the agency of certain officers appointed by law for the purpose, pursuant to the provisions of said act of 19th of February, 1866, sold and transferred the premises which it had so acquired from said first railroad company to Messrs. McKay, Vogel and Simmons, who thereupon sold and con-

veyed the same to Thomas Allen, who on the said 26th day of July, 1867, incorporated himself with others and duly organized the now existing St. Louis and Iron Mountain Railroad Company, one of the respondents, and transferred to said existing corporation all the rights acquired by him from his said vendors, and which his said vendors acquired from the State.

And it is also shewn by the bill that it was provided in and by said act of the 19th of February, 1866, under which the State so sold that the "persons purchasing any of the roads therein named, should have all the rights, franchises, privileges and immunities which were had and enjoyed by the companies, for whose default said roads were sold under the charter and laws amendatory thereof, subject however to the conditions and limitations therein contained, and not inconsistent with the provisions of that act."

As before stated, it is in the company last organized that the complainant is a stockholder.

The complainant's company, as shown by the bill, proceeded in the work of extending its said railroad, as required by said act of 19th February 1866, called the sell-out law, and in all things complied with the requirements of said law, and long before the institution of the suit had fully completed the extension of its road to Belmont on the Mississippi River. And further, that in the progress of said work the said General Assembly passed an act, approved March 17th, 1868, by which all of the rights, privileges, franchises and immunities of whatever kind, theretofore belonging to said defunct corporation, were confirmed to said company of the complainant.

It is then averred that the complainant "is advised that by the laws of the land, and especially by force of the provisions of the several laws therein before cited, the property of every description of the said existing corporation is part and parcel of the capital stock of said corporation, and that the several acts of the General Assembly therein before specified in connection with the acts and proceedings of the State officials therein before mentioned, constitute a legal and binding contract on the part of the State of Missouri, whereby it

and all its officers and agents are restrained and inhibited from imposing any State and County tax whatever on said capital stock, or on the property represented by the stock. Yet notwithstanding the rights and immunities thus secured to the said new corporation, and which it is entitled to have and enjoy unmolested," the Board of Assessors of St. Louis County in the year 1868, 1869 and 1870 unlawfully, as complainant charges, and in disregard of the said rights, immunities and franchises of said corporation and of the stockholders therein, and without the consent and approval of said corporation or its stockholders, listed and assessed for taxation for said years 1868, 1869 and 1870, the railroad track, machine shops, locomotive engines, cars and other property of said existing corporation in said County of St. Louis, and that other duly constituted officers of St. Louis County levied upon said assessments divers State and County taxes against said existing railroad corporation, being the same taxes to enforce payment of which the respondent Maguire had so aforesaid seized the property of said corporation.

The bill also shows a demand by the complainant upon the directors of his company, to resort to legal proceedings to arrest the threatened sale of the property seized, and to prevent the collection of the taxes sought to be enforced; and the refusal of said directors to comply, although expressly admitting the illegality of said taxes.

The relief prayed for is that the taxes sought to be enforced be declared to be illegal, and in nowise chargeable against the said existing railroad company, that the property and capital stock of said company be declared exempt by law from taxation for State and County purposes, and that the defendant Maguire be perpetually enjoined from selling the things seized, and for general relief.

All of the defendants except Maguire filed general demurrers to the bill: Maguire demurred specially. The only parts of Maguire's demurrer, which for the purpose of the questions to be discussed in this Court need be presented, are the following, viz: "As to so much and such part of the said bill as seeks to obtain a writ of injunction, enjoining this

defendant, his servants and agents from seizing and selling the locomotives and other property belonging to the St. Louis and Iron Mountain Railroad Company, whereof complainant is a stockholder, on the ground that the capital stock and property of said railroad company are in nowise liable for or chargeable with State and County taxes, this defendant demurs, and for cause of demurrer shew:

That if the St. Louis and Iron Mountain Railroad Company, incorporated March 3rd, 1851, possessed the immunity from taxation of its capital stock and property, as claimed in complainant's bill, yet complainant does not shew that the present St. Louis and Iron Mountain Railroad Company, of which corporation complainant is a stockholder, ever acquired said immunity from said other corporation by purchase or otherwise, or that the corporation, of which complainant is a stockholder, ever acquired immunity from taxation for its stock or property by a valid grant of the Legislature of the State of Missouri;

That complainant's bill affirmatively shews that if such immunity from taxation is unrevoked and unrepealed because irrevocable, it attaches to the stock and property of the St. Louis and Iron Mountain Railroad Company, incorporated by act of March 3rd, 1851, a corporation still in existence, and another and different corporation from the corporation of which complainant is stockholder."

The said several demurrers were sustained by the Court below, and the bill dismissed, and from that decree complainant appealed to this Court.

[NOTE.—The foregoing statement is submitted as a joint statement of appellant and respondents, it being understood that it is a mere concise statement of so much of complainant's bill and respondents' demurrer, as is deemed necessary to present the question, whether or no all property of the St. Louis and Iron Mountain Railroad Company, incorporated July 26, 1867, and of which complainant is a stockholder, is exempt by law from all State and County taxes—this being the only question which appellant and respondents desire to present to the consideration of the Court.

DRYDEN & DRYDEN, *for Appellant.*
R. E. ROMBAUER, *for Respondents.*]

ASSIGNMENT OF ERRORS.

The appellant for an assignment of errors says that the said Court below committed error to the great injury of the appellant in this, to-wit: That it refused to hold and decree that the property of the railroad corporation, of which appellant is a member, is by law exempt from taxation for State and County purposes, and refused to enjoin the respondent Maguire, as prayed in the bill, and for that said Court below dismissed the appellant's said bill without granting the relief asked.

Points and Authorities by Appellant's Counsel.

As is seen by the foregoing statement, there have been two railroad corporations in Missouri bearing the name of "The St. Louis and Iron Mountain Railroad Company," one created by act of Assembly of 3rd of March, 1851, and now defunct; the other created by filing articles of incorporation in the Secretary of State's office, July 29th, 1867, and still existing, being the one of which the appellant is a stockholder. The defunct company, soon after it was brought into being, commenced the construction of the railroad known as the St. Louis and Iron Mountain Railroad, and carried forward its enterprise from the City of St. Louis to Pilot Knob, a distance of about ninety miles, and while doing so contracted a debt of several millions of dollars to the State for State bonds, lent to the company in aid of the work: and, pursuant to the several acts of the General Assembly under which the aid was granted, mortgaged its railroad and appurtenances to the State to secure payment of the lent bonds by the company, with power of sale in case of the company's default.

The mortgagor having made default in the payment of the mortgage debt, there was a foreclosure of the mortgage, and at the foreclosure sale the State became the purchaser of the mortgaged property. The State then sold and conveyed to McKay and others, who sold and conveyed to Thos. Allen, who in due form organized the existing St. Louis and Iron Mountain Railroad Company, for the purpose of owning, completing and operating said railroad.

The claim lying at the foundation of the relief asked by the complainant, is that the existing corporation enjoys immunity from all State and County taxes by virtue of a valid contract existing between said corporation and the State of Missouri. The question whether it enjoys the immunity claimed depends upon whether the like immunity was enjoyed by the first company.

I. The original corporation, by the terms of its charter and the laws amendatory thereof, was exempt from taxation for State and County purposes. The charter of that corporation provides, § 24. * * * * "Every person who shall cease to be a shareholder, shall cease to be a member of said company; and the stock of said company shall be exempt from all State and County taxes.—[See Session Laws of 1836–7, p. 271; and Session Laws of 1850–51, § 5, p. 481; same law, R. R. Laws, pp. 41 and 47.]

But to the claim of perpetual exemption, based upon the charter-provision, it will be answered by counsel on the other side that the charter was accepted by the company subject to a general statute then in force, reserving to the Legislature the power of altering, amending and repealing at pleasure all charters thereafter granted. The statute referred to is the act entitled, "An Act concerning corporations," approved March 19th, 1845, [Revised Laws of 1845. p. 230,] the seventh section of the first Article of which is as follows: "The charter of every corporation that shall hereafter be granted by the Legislature shall be subject to alteration, suspension and repeal, in the discretion of the Legislature." But we reply that the power thus reserved, was expressly surrendered by the first section of the act of 17th of February, 1853, entitled, "An Act to amend an Act entitled, 'An Act to incorporate the St. Louis and Iron Mountain Railroad Company,' approved March 3rd, 1851," in these words:

§ 1. The St. Louis and Iron Mountain Railroad Company is hereby exempted from the provisions of the first article of the act entitled, 'An Act concerning corporations,' approved March 19th, 1845, except so far as said provisions may be contained in the act incorporating said company." * * * *

It will not be pretended that the reserved power was ever exercised or attempted to be exercised, as against the St. Louis and Iron Mountain Railroad Company, prior to the last recited act, if at any time after its passage. By the very terms of the surrender the charter became irrepealable:—and so that corporation during its existence was, by law, exempt from taxation for State and County purposes.

The question here arises, *What* was exempt?

The charter provides, as has been seen, that "the stock of said company shall be exempt." * * * * [R. R. Laws, § 24, p. 47 *supra.*]

The act of 17th February, 1853, amendatory of the charter, and cited above, provides that—"§ 5. All the engines, cars, wagons, machines and other property, belonging to said company, shall be deemed a part of the capital stock of said company, and shall be vested in the respective shareholders of the company forever, according to their respective shares." These provisions, we maintain, taken together exempt the *property* of the corporation from taxation. It is however understood that the learned counsel for the tax collector on the other hand holds that it is the *shares* of stock in the hands of the shareholders that is exempted. The question here between us has long since received the consideration of the Supreme Court of our State, and has been definitively settled in accordance with the position we have assumed. Hannibal and St. Jo. R. R. Co. vs. Shachlen, 30 Mo. R. 550. State vs. The Hannibal and St. Jo. R. R. Co., 37 Id. 267–8.

See to the same effect: Rome R. R. Co. vs. The Mayor and Common Council of Rome, 14 Geo. R., 277. 21 Maine R., 534. 31 Conn. 32 Barb. (N. Y.) 506. 8 Allen Mass. 330. 26 Penn. 244. 2 Zab. (N. J.) 546. 4 Id. 400.

We have thus shewn—*First*, that by the charter the stock of the company was exempt from taxation, and *Secondly* that exemption of the stock was exemption of the corporate property.

II. The existing St. Louis and Iron Mountain Railroad Company occupies precisely the *status* as respects franchises, as did the first company having that name. The present company derived whatever rights it has, under a sale made in November 1866 by the Governor and a Board of Commissioners, pursuant to the provisions of the act of the General Assembly entitled, "An Act to provide for the sale of certain railroads and property, by the Governor, to foreclose the State's lien thereon, and to secure an early completion of the South-west Branch Pacific, the Platte Country, the St. Louis and Iron Mountain and the Cairo and Fulton Railroads of Missouri," approved February 19th, 1866. The following is so much of said last named act as is pertenant to the case, viz:

"§ 1. The Governor is hereby directed and required to take immediate possession of the Southwest Branch of the Pacific Railroad, together with all the appurtenances, real estate, rolling stock, cars, engines, depots and other property, real or personal, and all rights and franchises thereunto attached or in any wise belonging, as is provided by law, and the said railroad, together with all the lands heretofore appropriated to the construction of said railroad, and belonging to the Pacific Railroad Company, for the use and benefit of said Southwest Branch, at the time of its default, as provided by the act, entitled "an act to accept a grant of land made to the State of Missouri by the

Congress of the United States, to aid in the construction of certain railroads in this State, and to apply a portion thereof to the Pacific Railroad," approved December 25th, 1852 and all other acts relating to said Southwest Branch, and all the appurtenances and franchises thereunto attached, having become the property of this State by operation of law, it shall be the duty of the Governor to do all things necessary and proper by him to be done to secure the same to this State, free from all claims or incumbrances of all other claimants whatsoever; and upon obtaining such possession, the Governor shall turn said road and the other property and assets aforesaid over to a Board of Commissioners hereinafter created, by them to be operated and sold in the interest of the State according to the terms and condition of this act. It shall be the further duty of the Governor to advertise the St. Louis and Iron Mountain Railroad, the Cairo and Fulton Railroad of Missouri, and the Western and Atchison, Atchison and St. Joseph and Platte Country Railroads, and *every part and section of each* of said roads as far as the same are constructed or projected, *together with their appurtenances, rolling stock and property of every description, and all rights and franchises thereto belonging, for sale,* and to sell the same at auction to the highest bidder, in pursuance of the provsions of the several acts creating a lien on said railroads, their appurtenances, rights and franchises, in favor of the State. The said Weston and Atchison, Atchison and St. Joseph and the Platte Country Railroads shall be known and designated hereinafter, and after the passage of this act, as the Platte Country Railroad. The Southwest Branch of the Pacific Railroad, shall be known and designated hereafter as the Southwest Pacific Railroad.

§ 2. A Board of Commissioners composed of three members, who shall be nominated by the Governor and confirmed by the Senate, is hereby etablished for each of said railroads, viz: The Southwest Branch of the Pacific Railroad, the St. Louis and Iron Mountain Railroad, the Cairo and Fulton Railroad of Missouri and the Platte Country Railroad. A majority of the members of each board shall at all times constitute a quorum for the transaction of business, and in case of a vacancy occurring in said boards, such vacancy shall be filled by appointment of the Governor, subject to the confirmation of the Senate at its next session thereafter. Said commissioners shall, before entering on the discharge of their duties, take and subsribe the same oath prescribed for other State officers. They shall each enter into bond, with such security and for such amount as the Governor shall from time to

time order and approve, conditioned for the faithful performance of their duties under the law. They may employ counsel and such agents and assistants as they may require in the performance of their duties. They shall account for and pay over to the State Treasurer all moneys that may come into their hands belonging to the State, whether derived from the sale or the net earnings of the respective roads, taking duplicate receipts therefor, one of which shall be deposited with the State Auditor. They shall make quarterly reports to the Governor of their proceedings, and a final report of all matters relating to the interests and trusts confided to them, immediately after the sale of their respective roads. And all letters, bids, proposals, oaths, bonds, books, papers and other documents that come into their hands, or into the hands of the Governor, or which they have executed to the State, shall be deposited with the Secretary of State. And they and their employees shall receive such compensation, besides necessary expenses, for their services as the Governor from time to time may allow and certify to the Auditor, who shall audit such allowance and draw his warrant for the same, to be paid out of any fonds in the treasury not otherwise appropriated; *Provided,* that the amount allowed for services shall not exceed in the aggregate one thousand dollars to each commissioner. All vacancies in any Board of Commissioners shall be certified to the Governor by the remaining commissioner or commissioners within twenty days after such vacancy occurs.

§ 3. It shall be the duty of the Board of Commissioners appointed for the Southwest Branch of the Pacific Railroad and the Platte Country Railroad to receive possession of said roads, appurtenances, lands, choses in action, and other property belonging thereto, from the hands of the Governor, and to manage, operate and dispose of the same in the manner and for the purpose provided in this act. It shall also be the duty of the commissioners respectively appointed for the St. Louis and Iron Mountain Railroad, the Cairo and Fulton Railroad of Missouri and the Platte Country Railroad, to *attend the sale of their respective roads* as advertised by the Governor, *and to bid in the same for the use and benefit of the State, for an amount not exceeding the respective liens* on said roads in favor of the State. And if said roads, or either of them, are struck off and sold to said commissioners, they shall take possession and hold the same, with their appurtenances and property, manage, operate and dispose of the same in the manner provided for in this act.

§ 4. Within thirty days after they shall have been appointed and qualified, the respective boards of commissioners aforesaid shall publish a notice of their appointment as such; of their authority to take possession of or to buy in said roads, together with the lands belonging to their respective roads, and again to sell the same; and they shall invite proposals for the purchase of their respective roads, lands and appurtenances and franchises from said commissioners. The notice in relation to the Southwest Branch Railroad shall be published for at least sixty days; the notices in relation to the St. Louis and Iron Mountain Railroad, the Cairo and Fulton Railroad and the Platte Country Railroad, shall each be published in conjunction with the respective notices of sale of said roads required by the first section of this act to be published by the Governor; they shall be published in the same manner, in the same newspapers, for the same time, and for sixty days thereafter. All such notices shall be published in at least two newspapers in the cities of St. Louis, New York, Philadelphia and Boston.

§ 5. The proposals of bidders under the provision of the foregoing section shall each state the price bid for the respective roads, and shall state that they are based on the following terms and conditions, which are hereby established to govern the sale of said roads by said boards of commissioners: First. The price or consideration bid shall be payable as follows: one-fourth on closing the contract, and the balance in five equal annual installments; the first installment payable in one year, the second in two, the third in three, the fourth in four and the fifth in five years thereafter, with six per cent. interest on deferred payments, payable annually; *Provided*, that all sums bid may be paid at any time, in either cash or the bonds or other liabilities of the State, or bonds guaranteed by the State. Second. The roads and all rolling stock belonging thereto shall be kept in good serviceable condition during the progress of the work to completion of said roads. Third. The Southwest Branch of the Pacific Railroad shall be finished to a point opposite to the town of Lebanon, in Laclede county, within three years, to the town of Springfield, in Greene county, within four years, and to the western line of the State in five years after the date of sale; and the purchaser shall expend at least five hundred thousand dollars in each and every year between the date of sale and date fixed for the completion aforesaid in the work upon the graduation, masonry or superstructure of said extension. The St. Louis and Iron Mountain Railroad shall be finished to a point south of Pilot Knob, to connect with

the Cairo and Fulton Railroad line, in three years, and finished to the Mississippi river, opposite to or below Columbus, Kentucky, in five years after the date of sale of said road; and the purchasers of said road shall expend in each and every year between the date of sale and the completion of the road at least the sum of five hundred thousand dollars, in the work of graduation, masonry or superstructure on said extension; and the Cairo and Fulton Railroad of Missouri shall be completed from the Mississippi river, opposite the town of Cairo, Illinois, or Columbus, Kentucky, to the intersection of the St. Louis and Iron Mountain Railroad line, within three years after the date of sale thereof. The Platte Country Railroad aforesaid shall be finished from a point on the Missouri river, opposite the city of Kansas, to the city of Weston, and from Savannah to Forest City, in two years from the date of sale, and shall be completed to the Iowa State line in three years thereafter; and the purchaser of said road shall expend in each and every year between the date of sale and the time fixed for the completion aforesaid in graduation, masonry and superstructure of said road, the sum of at least two hundred and fifty thousand dollars; *Provided*, that the faithful annual expenditures required in this section shall entitle the respective companies to an extension of time of payment of principal of purchase money due that year until two years after maturity of last installment; *And, provided*, that an annual statement of expenditures on each road shall be made, under oath, by the treasurer and two directors thereof, and filed with the Secretary of State.

§ 6. On the day named in the respective notices of sale of said roads, by said commissioners, the respective boards shall proceed to compare the several bids and proposals by them received, and shall as soon thereafter as is practicable, award the roads and every part and section thereof, their franchises and appurtenances, and all lands and other property, real and personal, to the highest and best bidders, whose bids are made in compliance with the terms and conditions of the foregoing sections of this act; *Provided*, that the Governor shall approve said awards; *And, provided further*, that all proposals may be rejected, if the commissioners deem them unsatisfactory.

§ 7. In case all the bids for any road are declared unsatisfactory, as provided in the preceding section, notices of sale shall be renewed from time to time, and shall be published in conformity with

the requirements hereinbefore provided for, for three months, and the same proceedings shall be had in relation to proposals, comparison of bids and awards, and all other matters relating thereto, as is hereinbefore provided for, until a sale of all said roads is effected; *Provided*, that if, in the opinion of the Governor, the interest of the State will be promoted, and a more expeditious and advantageous sale secured thereby, and work on said Southwest Branch Railroad be more speedily commenced, he shall direct, in writing, the commissioners for said road to sell said road and all its lands, property, franchises and appurtenances at private sale, without notice of sale as herein required, on such conditions as to the payment of the purchase money, the mode of completion, and the right of the purchaser to borrow money for the completion of said road, as the parties contracting may agree upon; *Provided, however*, that no sale, under the provisions of this section, shall be made, which shall not preserve to the State a lien for the amount of the purchase money remaining unpaid, or which shall not secure the completion of the Southwest Pacific Railroad, to a point opposite the town of Lebanon, in Laclede county, within three years, to the town of Springfield, in Greene county, within four years, and to the western line of the State, within five years after the date of sale, or which shall not secure the expenditure of at least five hundred thousand dollars each year, in the construction and equipment of said road, until the same is completed; *And provided, however*, no sale made shall be completed until first approved by the Governor.

§ 8. Whenever, and as soon as an award is made and approved, under either of the foregoing sections, the commissioners and the purchasers shall execute in duplicate a contract, embracing all the terms, stipulations and conditions to be performed by either party, and on which such sales and purchases are made, which duplicate agreement shall be approved by the Governor, and one copy filed with the Secretary of State; and thereupon the Governor shall, in the name and on behalf of the State, execute and deliver to such purchasers a formal deed of conveyance, under the great seal of the State, which shall be construed as other deeds conveying real estate, and shall have *the effect to convey, transfer and make over to the purchasers said road and all of the franchises, privileges, rights, title and interests appertaining to the road so sold, all roads, road beds, rolling stock, machine shops, and all other property, both real and personal, of every description, belonging or in any wise appertaining thereto*, and in the case of the Southwest Branch of the Pacific Railroad, all the lands granted by the

United States to the State of Missouri, by act of Congress, approved June 10, 1852, and by the State of Missouri granted to the said Pacific Railroad, for the construction of the said Southwest Branch, by an act approved December 25, 1852, which have been forfeited to the State; and the purchasers shall execute and deliver to the State of Missouri mortgages in [on] said roads, franchises, lands, and property aforesaid, as is required by this act, to secure the payment of the purchase money; *Provided*, that nothing in this act shall be so construed as to convey or to authorize the commissioners to convey to the purchasers of the Cairo and Fulton Railroad any of the lands subscribed by counties to the stock of said road.

§ 9. The companies or persons purchasing any of the above named roads shall have all the rights, franchises, privileges and immunities which were had and enjoyed by the companies for whose default said roads were sold, under the charter and the laws amendatory thereof; subject, however, to the conditions and limitations therein contained, and not inconsistent with the provisions of this act."

[Session Laws of 1865–66, p. 107.]

This act, as an examination of it will show, provides all the details of the sale, and declares in terms the most explicit, what the effect and operation of the proceedings should be, and what rights the purchaser should acquire. By the first section it was made the duty of the Governor to advertise for sale the things corporeal "of every description, *and all rights and franchises*."—The third section provided that the Board of Commissioners should attend the Governor's sale, and on a contingency named purchase for the State.—The fourth section made it the duty of the Commissioners, anticipating a purchase by the State at the foreclosure sale, to give notice of their authority to sell, and to invite proposals to purchase, and to report their proceedings to the Governor for his approval or rejection.—The eighth section made it the duty of the Governor, on a sale being made, to make a deed to the purchaser which, it was provided, should have "the effect to convey, transfer and make over to the purchaser said road and *all of the franchises*, privileges and rights, title and interests appertaining to the road," * * * * and as if to put beyond all doubt or cavil the meaning and intent of the General

Assembly, as respects the rights and franchises, the purchaser was to acquire at the proposed sale, it is by the ninth section further provided, as is seen that the purchaser should acquire by his purchase "all the rights, franchises, privileges and *immunities* which were had and enjoyed by" the defunct corporation "under the charter and the laws amendatory thereof."

And as still further evincing the fixed and deliberate purpose of the Legislature to put the purchaser of this road upon the same footing as respects franchises, as was occupied by the now defunct corporation, just one month after the passage of the sell-out act, as it is called, and pending proceedings thereunder for the sale of the road, another act was passed, approved March 20th, 1866, entitled, "An Act authorizing the incorporation of the purchaser or purchasers of any railroad, or of any part, section, or branch thereof, which has heretofore or may hereafter become forfeited to and sold by the State," by which it is provided as follows:

"§ 4. Each corporation provided under this act shall have the same power, franchises, rights and privileges, and be subject to the same liabilities and restrictions as the corporation to which it shall become the successor may have had by its original charter, and the amendments thereto, into and over the property and franchises forfeited and sold as aforesaid, and the time and manner of electing directors of any corporation hereunder created or formed, the election or appointment of its officers, agents and servants, the enactment of by-laws, the transfer of stocks, the collection of unpaid balances of subscriptions to stock, and all other acts which, by such original charter and the amendments thereto, have been or may hereafter be regulated, shall be determined and regulated by and performed in accordance with said original charter and amendments thereto, except as herein otherwise provided."—[Session Laws of 1865–6, p. 102.]

Whatever may be the effect of this legislation and of the action of the officers of government under it, there is no room for doubt that it was the intention of its authors to put the purchaser at the contemplated sale upon precisely the same footing, as respects rights and franchises, as that occupied by the corporation whose property was to be sold. Then, as

immunity from taxation was one of the franchises of the old company, it was the intention of the Legislature to give the like immunity to the purchaser. The *intention* of the law-maker is the law.

But it will be objected by the learned counsel on the other side that, although it was the clear intention of the Legislature to vest in the purchaser by means of the sale by the Commissioners, the like franchises as those enjoyed by the original corporation; still the sale could not have the effect intended, because the statutory mortgage, did not cover nor give power to sell the franchise of the mortgagor; and as the State, at the foreclosure sale, did not acquire the franchises of the mortgagor, it could impart to its vendee such rights only as it had acquired from the mortgagor. We controvert as well the truth of his premises, as the soundness of his conclusions.

Were the franchises of the mortgagor not mortgaged?

See Note in Appendix.

By the provisions of the several acts granting aid to the St. Louis and Iron Mountain Railroad Company, the constituents of the mortgage in this case are determined by the act of 22nd February, 1851, entitled, "An Act to expedite the construction of the Pacific Railroad, and of the Hannibal and St. Joseph Railroad."

The following is all of that act which need be seen by the Court, viz:

"§ 3. No part of the said bonds shall be delivered to the said companies, or either of them, until the acceptance thereof shall be signified to the Secretary of State, by the filing in his office of a certificate of such acceptance, under the corporate seal of the company thus accepting, and the signature of their president.

"§ 4. Each certificate of acceptance so executed and filed, as aforesaid, shall be recorded in the said office of the Secretary of State, and shall thereupon become and be according to all intents and purposes a mortgage of *the road* of the company executing and filing their acceptance aforesaid, *and every part and section thereof*, and *its appurtenances*, to the people of this State, for securing the payment of the principal and interest of the sums of money for which such bonds shall from time to time be issued and accepted as aforesaid."—[See Session Acts 1850–51, p. 267; same Act R. R. Laws, p. 61.]

Thus it is seen the words descriptive of the things mortgaged are "the road of the company" * * * * * * "and every part and section thereof, and its appurtenances."

It is an open question whether, if the word "appurtenances" had been omitted, the remaining words of the sentence would not of themselves have been sufficient to pass the franchises of the mortgagor as incidents of the principal thing mortgaged; but that the word "appurtenances" in connection with the rest of the sentence was sufficient to pass the incorporeal rights of the mortgagor, pertaining to the corporeal things mortgaged, ought not to be considered a ground of dispute.

It is wide of the law to suppose that the office of the word "appurtenances" in a conveyance of things corporal is to pass things tangible. As a rule, things corporeal are not appurtenant to things corporeal, nor things incorporeal to things incorporeal; but things incorporeal are appurtenant to things corporeal, and things corporeal to things incorporeal. [4 Bac. Abr. Bouvier's Ed. Title Grant. I. 4 (b) p. 534. Bouvier's Law Dec. title appurtenances.]

A water right appurtenant to a mill passes by the word appurtenances. [Pickering vs. Staples, 5 S. & R. 107.]

"Lands, in a conveyance of land, will not pass under the word appurtenance in its strict technical sense; they will pass if it appears that a larger sense was intended to be given to it." [6 Bac. Abr. 136. Buch vs. Norton, 1 Bos. & P. 53.]

The words, "the road and every part and section thereof" covered everything corporeal, and the words " and its appurtenances " everything incorporeal.

The position that the franchises were not covered by the mortgage rests upon the exploded theory, that the mortgagor-corporation still survives, clothed with all the franchises it ever enjoyed. Although it is not necessary to our case, as we will hereafter shew, to refute this position, yet we would here note that the position is plainly in conflict with the view held by the Legislature, as evinced by the sell-out law, and is quite as notably opposed to the ruling of the Supreme Court of the State, who in answer to State questions submitted by the Governor [37 Mo. R. 134] say: " When the State becomes the purchaser of such railroad under the lien reserved, both the lien *and the former company are extinguished.*"

An extinguished company is a dead company, and a dead company has no franchises. [4 Gill & John R. 1 Canal Co. vs. Railroad Co.]

Another objection to the immunity claimed is interposed by the counsel for the respondents, based upon the 16th section of article 11 of the constitution of the State of Missouri, which went in force on the 4th of July 1865. It is maintained by the counsel that the General Assembly was inhibited by the provisions of that section from granting the exemption, which, it is claimed by the appellant, was conferred by the sell-out law and proceedings thereon. The section referred to is as follows, viz:

" XVI. No property, real or personal, shall be exempt from taxation, except such as may be used exclusively for public schools, and such as may belong to the United States, to this state, to counties, or to municipal corporations, within this state."

(*Gen. Stats. 1865, p. 43.*)

The Court will be pleased to bear in mind that the same convention that framed the constitution, of which the section under consideration is part, also framed an ordinance relating specially to the subject of *taxation* and *disposition* of this and other railroads, and that the ordinance and constitution were both submitted to a vote of the people at the same time,

and both were then and there adopted; and that by its own terms the ordinance by its adoption by the people became a part of the constitution. The following is the ordinance referred to:

AN ORDINANCE

FOR THE PAYMENT OF STATE AND RAILROAD INDEBTEDNESS.

Be it ordained by the people of the State of Missouri, in convention assembled, as follows:

SECTION I. There shall be levied and collected from the Pacific railroad, the North Missouri railroad company, and the St. Louis and Iron Mountain railroad company, an annual tax of ten per centum of all their gross receipts for the transportation of freight and passengers (not including amounts received from and taxes paid to the United States), from the first of October, 1866, to the first of October, 1868, and fifteen per centum thereafter; which tax shall be assessed and collected in the county of St. Louis, in the same manner as other state taxes are assessed and collected, and shall be appropriated by the general assembly to the payment of the principal and interest now due, or hereafter to become due, upon the bonds of the state, and the bonds guaranteed by the state, issued to the aforesaid railroad companies.

II. A like tax of fifteen per centum shall be assessed and collected from the Hannibal and St. Joseph railroad company, and from the Platte county railroad company, whenever default is made by said companies, or either of them, in the payment of the interest or principal of the bonds of the state, or the bonds guaranteed by the state, issued to said companies, respectively; which tax shall be assessed and collected in such manner as the general assembly may by law direct, and shall be applied for the payment of the principal and interest of said bonds, as the same may become due and payable.

III. The tax in this ordinance specified shall be collected from each company hereinbefore named only for the payment of the principal and interest on the bonds, for the payment of which such company shall be liable; and whenever such bonds and interest shall have been fully paid, no further tax shall be collected from such company; but nothing shall be received by the state in discharge of any amounts due upon said bonds except cash or other bonds or obligations of this state.

IV. Should either of said companies refuse or neglect to pay said tax as herein required, and the interest or principal of any of said bonds, or any part thereof, remain due and unpaid, the general assembly shall provide by law for the sale of the railroad and other property, and the franchises of the company that shall be thus in default, under the lien reserved to the state, and shall appropriate the proceeds of such sale to the payment of the amount remaining due and unpaid from said company.

V. Whenever the state shall become the purchaser of any railroad or other property, or the franchises sold as hereinbefore provided for, the general assembly shall provide by law in what manner the same shall be sold, for the payment of the indebtedness of the railroad company in default; but no railroad or other property, or franchises purchased by the state, shall be restored to any such company until it shall have first paid, in money or in Missouri state bonds, or in bonds guaranteed by this state, all interest due from said company; and all interest thereafter accruing shall be paid semi-annually in advance; and no sale or other disposition of any such railroad or other property, or their franchises, shall be made without reserving a lien upon all the property and franchises thus sold or disposed of, for all sums remaining unpaid; and all payments therefor shall be made in money, or in the bonds or other obligations of this state.

VI. The general assembly shall provide, by law, for the payment of all state indebtedness not hereinbefore provided for; and for this purpose a tax of one quarter of one per centum on all real estate and other property and effects subject to taxation, shall be assessed and collected, and shall be appropriated for the payment of all such indebtedness that may have matured, and the surplus, if any, shall be set apart as a sinking fund for the payment of the obligations of the state that may hereafter become due, and for no other purpose whatsoever.

VII. At the election to be held on the sixth day of June, eighteen hundred and sixty-five, for the purpose of ascertaining the sense of the people in regard to the adoption or rejection of the constitution adopted by this convention, the question of the adoption or rejection of this ordinance shall be submitted to the voters of this state, who shall be qualified as voters under the provisions of article thirteenth of said constitution, and shall take the oath in said article prescribed; and the vote of such election shall be taken and returns thereof made, at the same time, under the same restrictions and in

the same manner as in said article is provided for the vote upon the same question of the adoption or rejection of said constitution. The election herein provided for shall be by ballot. Those ballots in favor of this ordinance shall have written or printed thereon the words, "*Shall the railroads pay their bonds?—Yes.*" Those opposed to this ordinance shall have written or printed thereon the words, "*Shall the railroads pay their bonds?—No.*" If the majority of all the votes cast at such election shall be in favor of this ordinance, the same shall be valid and have full force and effect as a part of the constitution of this state, whether the new constitution adopted by this convention be adopted or rejected.

If a majority of such votes shall be against this ordinance, it shall have no force or validity whatsoever.

The Governor of this state shall, by proclamation, make known the result of the election herein provided for.

Adopted in convention, April the eight, eighteen hundred and sixty-five.

ARNOLD KREKEL, President.

AMOS P. FOSTER, Secretary.

(*Gen. Stat. of 1865, p. 53.*)

The Court will further bear in mind that this ordinance, at an early day after its adoption, engaged the careful attention of all of the three departments of the State government. On the 1st of November 1865, within the first four months of the lifetime of the new constitution, the General Assembly met, and at an early day thereafter bills were introduced into both houses, providing for the sale of the several railroads, and among the rest the St. Louis and Iron Mountain R. R., then in default. Pending these bills, questions as to the operation, force and effect of this ordinance arose in the mind of the Governor, and in view of obtaining light from the highest judicial source in the State, to guide his conduct in the matter of giving the executive sanction to said pending bills, he on the 27th of the same month of November propounded to the judges of the Supreme Court, as it was his right to do under the 11th section of article 6 of the constitution, several interrogatories as to the bearing and operation of the ordinance, and among the rest Interrogatory Second as follows:

"If you are of opinion that the sale of the railroads may be ordered before such refusal or neglect, I request you to say whether such sale can be made "without reserving a lien upon all the property and franchises thus sold for all sums remaining unpaid," as provided by section 5 of the ordinance. In other words: does this clause in the ordinance constitute a condition of *all* sales of railroads ordered by the state, or does it refer only to sales made, under the ordinance, for refusal or reglect to pay the tax?" [Advisory Constitutional Opinions, 37 Mo. R., 129.]

To these questions the judges replied elaborately. In the course of their reply they say that one of the things provided for by the ordinance is a tax to pay the indebtedness of the railroad companies to the State, and another thing provided for is, "in what manner railroads purchased by the State under her lien shall be sold again," [37 Mo., 132]; that "the fifth section relates to all sales of railroads under liens reserved to the State," whether sold for the non-payment of the tax, or for the non-payment of the mortgage-debt [Id. 133]—"the fifth section," say the judges, "provides further that no sale or other disposition of any such railroad or other property, *or their franchises*, shall be made by the State without reserving a lien upon the property sold for all sums remaining unpaid, —that is to say by the purchaser, and the purchaser is required to make all payments therefor in money, or in bonds, or other obligations of this State; but the Legislature is left *unrestricted* further as to the *time*, *terms* and *conditions* of sale," [Ib. 133.] Here then is an unequivocal declaration of the highest judicial tribunal of the State, that this ordinance has relation to two things—First, to taxation, and Second, to the manner of sale of these railroads, and that as touching the sales directed by it, the Legislature is left unrestricted as to the *terms* and *conditions* of the sale, further than an injunction to reserve a lien for the purchase money. Upon the heels of this judicial declaration, the Legislature passes, and the Governor approves, the act of 16th February, 1866 [printed above.] It is apparent upon the face of this law, that it took shape from this opinion of the judges, and was passed by the Assembly, and approved by the executive, upon the

settled conviction of both, that the ordinance gave to the Legislature unlimited power in the prescription of the terms and conditions of sale. It scrupulously provides for securing deferred payments of the purchase money, [see sections 7 and 8 of the act], the great point of interest with the State being the early completion of the road, the act provides that the purchaser shall expend annually a stated sum on the extension of the work, and that the whole shall be completed within a limited time; it provides for a deed to be made by the Governor, and defines its effect [section 8,] which would seem to make it operative to convey everything conceivable that pertained to the road, in the hands of its former proprietor; but if to clear away all doubt and to remove all cavil as to the meaning of the Legislature, and as to the conception of their powers under the ordinance it is provided in section 9, as has been seen, "that the companies or persons purchasing any of the above named roads, shall have all the *rights*, *franchises*, *privileges* and *immunities* which were had and enjoyed by the corporations, for whose default said roads were sold under their charters, and the laws amendatory thereof, subject however to the conditions and limitations therein contained, and not inconsistent with the provisions of that act." This law was not enacted with inconsiderate haste, but was passed after the most mature deliberation. It was introduced, it has been seen, early in November 1865, and it became a law not until February of the succeeding year; nor was it passed by an Assembly, and approved by a Governor, who were unacquainted with the views and motives of those who framed the new constitution: on the contrary, the public history of the times will attest many of the members of the Assembly that passed the law were themselves members of the convention that framed the constitution, and the Governor who approved the law was the same who filled the executive chair during the whole period of the convention's deliberations, and bore a most prominent part in the discussion of the work of the convention pending the question of its adoption by the people.

We reply therefore to the objection, based upon the 16th section of article 11 of the constitution—

First—That said section and said ordinance, being parts and parcels of one law, they ought not to be construed separately, but in the construction of the one, the other ought to be taken into consideration. [Bac. Abr. Title Statute I. 2. Pennington vs. Coxe, 2 Cr. R. 33. United States vs. Fisher, Ib. 358. The schooner Harriet, 1 Story R. 251.]

That inasmuch as the ordinance, by its plain words, intended to pass to the purchaser all the franchises of the railroad companies named in it,—and as one of the franchises of at least one of the companies was exemption of its property from taxation, the ordinance was of necessity an exception, and intended to be an exception to the general rule established by the 16th section, subjecting all property to taxation. There is room for both parts of the law to operate,—the rule and the exception each in its place, and the law should be so construed as that both may stand and have effect. [Pennington vs. Coxe, *Supra.*]

Second—The rule and the exception are not inharmonious in their general objects. The primary object of the rule is *revenue.* If revenue was not the primary object of the exception, it was at least a prominent one, as a recurrence to the situation of the State and the history of the times will show, —and this is a test to which resort may legitimately be had in the construction of the law, [Preston vs. Browder, 1 Wheat R., 121.] At the time of the adoption of this constitution and ordinance, we were staggering under the burden of an enormous State debt, with a population scattered and diminished and with resources wasted and destroyed by a devastating

war, from which we were but just emerging. In such an exigency, what measure would so likely add to the numbers and wealth of the people, and hence to the taxable values of property, and to the resources of the State, as the extension of her railroads, then but just begun, into the vast mineral and agricultural regions of the State, lying as yet undeveloped, unproductive, and in a great measure unpeopled? It was in this view, and in a large degree as a measure of finance that the convention resolved upon the project of closing out these roads, and extending them to their ultimate destinations. But in order to the success of the project, *bonuses* and privileges and franchises had to be offered to induce the embarkation of capital, apparently but not really, at the expense of the public revenue.

Third—That upon a fair construction of the ordinance power was given to the legislature to grant to the purchasers of the property of the defaulting corporations, the exemption insisted upon in the Bill. The fourth section of the ordinance relates to a period of time prior to the foreclosure, while yet the title to the property remains with the mortgagor, and contemplates a then future sale in foreclosure at which the State might become the purchaser. The fifth section looks to a period after foreclosure and presupposes the purchase of the mortgaged property by the State at the foreclosure sale—both sections direct that provision be made by law for sales. What is it that the fourth section requires to be sold?—"The railroad and other property and the franchises,"—not one franchise merely, but the plural—franchises, *all* of the franchises of the Company. What by the fifth section is to be sold? The answer is, the *same railroad*—the *same other property*—the *same franchises* "as hereinbefore provided for" in the fourth section. All, without exception or diminution that the state acquired at the sale under the fourth section was to be sold by it to its own vendee under the fifth section—the vendee of the state was to take every right that the state acquired at the sale for foreclosure. The state acquired at the foreclosure sale every right that the mortgagor had. If the mortgagor had the right to hold its property exempt from taxation,

that right by the provisions of the ordinance would pass by the sale under the mortgage to the state and then from the state to its vendee. If it be objected that the franchises of the St. Louis and Iron Mountain Railroad Company did not for want of apt words pass by the mortgage, and that therefore the franchises of the Company did not pass to the state at the foreclosure sale.—We reply, first, that the words of the mortgage were and are sufficient in law to pass the franchises of the mortgagor. But second, the objection, is not well taken, and is no answer because this ordinance was the work of the sovereign people acting as law maker in their sovereign capacity. The sovereign possesses within himself all fulness of franchises. He is the author and source of all franchises. He professed in this ordinance to possess and to be able to impart the franchises of these defaulting companies. His lawfully appointed agents sold, and for him professed to convey these franchises, and having done this he will not be permitted now to stultify himself by the plea that he did not possess the thing he professed to grant; but if true he must be held to supply the lack from his original inexaustible stores.

It was the clear intention of the convention to give to the purchaser all that was enjoyed by the companies in default, and it was just as clearly within the competency of the convention to give what it thus intended to give whether the franchise previously given out had come back to the state or not,—and as all parties vendor and vendee here contracted upon the idea that the one was giving and the other receiving the franchises claimed, it is no hardship to hold nor is it any stretch of judicial authority to decide that in law the convention gave what it then intended to give and had the power to give.

III. The unbroken, uniform contemporaneous construction of this ordinance by all the departments of the state government—legislative, executive and judicial, including the attorney general of the administration immediately following the adoption of the constitution conformably to the views herein insisted upon ought to be held to be the settled law of the case.

Cohens vs Virginia 6, Wheal. 418, Union Ins. Co. vs. Hoge 21, How. (U. S.) R. 66, Edwards Lessee vs. Darley 12 Wheal. 210, Hughes vs Hughes 4, Monroe (Ky.) R. 43, Britton vs. Ferry 14, Mich. R. 66, Plummer vs. Plummer et al. 37, Miss. R. 199, Rogers vs. Goodwin 2, Mass. R. 478.

The reasons in favor of the rule requiring adherence to contemporaneous construction have special force and are peculiarly applicable in this case, in that before the *sell-out* law was passed in which it is now supposed the legislature transcended its powers, the judiciary whose especial duty it is to expound the law was required to pass upon the extent of legislative power under this very ordinance and in its exposition of the same it asserted for the legislature all the powers the latter body exercised in the passage of the disputed act. A departure here from the rule of comtemporaneous construction, and holding at this late day that the legislature had no power to give what it professed to give, would work the grossest wrong to parties contracting and paying their money on the faith of that construction.

IV. If it were conceded that the legislature had no power under the new constitution, to exempt, property from taxation, still it undoubtedly possessed the power to commute taxes on property.

The agreement of the vendee of the state to expend a half million a year in the extension of the road, and to complete it within a time limited and in the meantime to keep up the road and rolling stock, was a valuable consideration and sufficient to support the state's agreement to give to the appellant's company immunity from taxation. 30 Ill. R. 148, Ill. Centr. R. R. Co. vs McLean County 17, Ill. R. 291, Morris Newstadt and the City of Lasalle vs the Ill. Centr. R, R. Co. 31, Ill. R. 484.

B R Curtis &

DRYDEN & DRYDEN,

for Appellant.

APPENDIX.

The following is the first section of the confirmatory act of March 17th, 1868, referred to in appellant's statement of the case at page 5, viz:

"SECTION 1. The ownership of all that certain railroad known as the St. Louis and Iron Mountain Railroad, and of all the property and estate, rights, franchises, privileges, and immunities of whatever kind, heretofore belonging or pertaining to the St. Louis and Iron Mountain Railroad Company, which was incorporated by an act of the General Assembly of this State, approved March 3, 1851, is hereby (any suit of the State, or any officer thereof, to the contrary notwithstanding) forever vested in and confirmed to Thomas Allen and to his heirs and assigns, subject to the mortgage and lien mentioned in sections two and six of this act."—[Session Laws of 1868, p. 95.]

NOTE.—It is said, on page 19 of this brief, that by the provisions of the several acts granting aid to the St. Louis and Iron Mountain Railroad Company the constituents of the mortgage—rather of the several mortgages—are determined by the act of 22d July, 1851. This statement needs correction; for it will be seen that by one of the six acts mentioned in the bill granting aid to said corporation, viz, the act approved March 3, 1857, entitled "An act to amend an act to secure the completion of certain railroads in this State, and for other purposes," approved December 10, 1855, the subject of the mortgage is described as "the road and *property* of the" mortgagor—language surely comprehensive enough to cover everything intangible as well as tangible of the mortgagor. We desire to call the attention of the court to section seventeen of that act, being all of it that is pertinent, as follows:

"SEC. 17. All bonds issued under the provisions of this act shall constitute a first lien or mortgage upon the road and property of the several companies so receiving them, in the same manner as provided by the act approved February 22, 1851, to expedite the construction of the Pacific Railroad and of the Hannibal and St. Joseph Railroad, and the act approved December 10, 1855, of which this is amendatory." (R. R. Laws, p. 93.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1873.

No. 106.

SPENCER TRASK, APPELLANT,

vs.

CONSTANTINE MAGUIRE, THE ST. LOUIS AND IRON MOUNTAIN RAILROAD COMPANY AND OTHERS, RESPONDENTS.

ARGUMENT AND BRIEF

— OF —

R. E. ROMBAUER,

SOLICITOR FOR RESPONDENT MAGUIRE.

Ahner, Menning & Co., Prs., 211 Market st.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1873.

SPENCER TRASK, *Appellant*,

vs.

CONSTANTINE MAGUIRE,
THE ST. LOUIS & IRON MOUNTAIN RAILROAD CO., &c.,
Respondents.

No. 106.

ARGUMENT OF R. E. ROMBAUER,

Solicitor for CONSTANTINE MAGUIRE, *one of respondents.*

The only question presented to the Court for adjudication in this cause is this, whether all property of the corporation whereof complainant and appellant is a stockholder, is by a valid and irrepealable legislative grant of the State of Missouri forever exempt from all State and County taxes?

This is not the only question arising upon the record. The question of the jurisdiction of the Court as determined by the character of the parties litigant, the question of the jurisdiction of a court of equity as determined by the nature of the trespass complained of, are questions that present themselves, but will not be

pressed in the course of this argument, as both sides are equally desirous not to embarrass the Court in its consideration of the main question, by the argument of minor issues.

Before proceeding to the argument of this main question, however, I beg leave to call the attention of the Court to the fact, partly disclosed by complainant's bill, and more fully shown in the course of this argument hereafter, that ever since the 26th day of July, 1867, two corporations existed and still exist in the State of Missouri, known by the corporate name of "*The St. Louis and Iron Mountain Railroad Company.*" The first of these corporations was created by an act of the General Assembly of the State of Missouri, approved March 3rd, 1851. The second of these corporations was organized on the 26th day of July, 1867, by authority of and pursuant to an act of the General Assembly of the State entitled, "An Act authorizing the incorporation of the purchaser or purchasers of any railroad, or of any part, section or branch thereof, which has heretofore, or hereafter may become forfeited to and sold by the State," approved March 20, 1866.

Record page 7.

The appellant is a stockholder of the second of these corporations, that is the corporation organized on the 26th day of July 1867.

For the sake of brevity, I shall in the course of this argument hereafter designate these two corporations respectively as *the corporation of 1851*, and *the corporation of 1867*.

The claim of the appellant, that all the property of the corporation of 1867, is forever exempt from all State and County taxes, can, under the statements in his bill, be based only on these two propositions:

First—That the corporation of 1867 acquired this privilege by becoming the purchaser, or rather grantee

of the purchaser at mortgage sale of all the property of the corporation of 1851.

Second—That the corporation of 1867 became possessed of this privilege by virtue of an original grant, made to it, by the Legislature of the State of Missouri. That neither of these propositions can be successfully maintained, I shall endeavor to show by following the claim through all its details.

On the 3rd of March 1851 the Legislature passed an act entitled, "*An Act to incorporate the St. Louis and Iron Mountain Railroad Company.*" This was the charter of the first company, and among other provisions contained the following: Laws of Mo. 1851. page 479.

"SECTION 5. That an act entitled, 'An act to incorporate the St. Louis and Belleview Railroad Company,' approved January 23, 1837, is hereby revived and made a part of this act, except the first, second and twelfth sections, and so much of the sixth section which names the points of location of said road, which sections and part of sections are superseded by the provisions of this act."

The act to incorporate the St. Louis and Belleview Mineral Railroad, thus made part of this company's charter, provided among other things:

"SECTION 24. Whenever the aforesaid amount of one thousand shares are subscribed, all the powers, privileges, rights, immunities and benefits, conferred or intended to be conferred by this charter, shall be invested in the holders of said shares, and whenever any other portion of the capital stock is subscribed for, the same shall be vested in all subsequent subscribers.—Every person who shall cease to be a shareholder, shall cease to be a member of said company, **and the stock of said company shall be exempt from all State and Couty taxes."** Laws of Mo. 1836-37, page 271.

At the date of the creation of the corporation of 1851, it was provided in the first article of the general corporation law of 1845, that:

"The charter of every corporation that shall hereafter be granted by the Legislature, shall be subject to alteration, suspension and repeal at the discretion of the Legislature." Rev. Stat. Mo. 1845 page 232.

The grant of the privilege of exemption from taxation was therefore in its origin, only a grant *bene placitum*, resumable at the pleasure of the Legislature, and in nowise an unimpairable contract.

Laws of Mo. 1853, page 296.

On the 17th day of February, 1853, the Legislature passed a further act entitled, "An Act to amend an Act entitled, 'An Act to incorporate the St. Louis and Iron Mountain Railroad Company,'" which act among other things provided:

"SECTION 1. That the St. Louis and Iron Mountain Railroad Company is hereby exempted from the provisions of the first article of the act entitled, 'An act concerning corporations,' approved March 19, 1845," and

"SECTION 5. All the engines, cars, wagons, machines and other property belonging to said company, shall be deemed a part of the capital stock of the company, and shall be vested in the respective shareholders of the company forever, according to their respective shares, and transferable by them in the transfer of stock, as personal property; but no transfer of stock shall be made without the consent of said company, until the whole amount due upon such stock shall be fully paid up."

By putting all the provisions of the various acts, as above set out, together, the grant of perpetual exemption from taxation as part of an unimpairable contract between the State of Missouri and the corporation of 1851, is claimed to be made out by appellant.

I shall not argue in this connection that the grant which was completed only in 1853, can hardly be said to be supported by the consideration impliedly received by the State, in the corporation's acceptance of the charter of 1851, nor that the act of 1853, imposing no additional burdens on the corporation, but on the contrary being a grant of additional privileges only throughout, gave to the State in itself no equivalent whatever for its parting forever with its right of taxation, as far as the property of this corporation was concerned,—I shall not argue this, because I believe some recent decisions of this Court have placed grants of this character, contained in subsequent amendments, on the same footing as if contained in the original charter.

Tomlinson vs. Branch. 15 Wall 469, 470.

It is hardly necessary to state, that if the Court should be of opinion, that the grant of perpetual ex-

emption from taxation, notwithstanding the amendment of 1853, was resumable by the Legislature, it takes away all foundation of plaintiff's claim, which rests for its support entirely on the irrepealable character of this grant, as will hereafter appear.

I shall for the purposes of this argument, assume that the grant contained in all these acts taken together, gave to the corporation of 1851 an irrepealable charter, and that no part thereof could be altered, amended or repealed without the consent of the corporation; from this it necessarily follows, that unless the corporation voluntarily parted with its franchises or privileges, the State never could seize any of them, except by a judgment of forfeiture obtained upon official information against this corporation.

1. Blackst. Com. 485.
2. Kent's Com. p. 305.
Penobscot Boom Corporation vs. Lawson, 16 Me. pp. 230, 231, &c.

That all privileges of exemption must be either such as attach to specific property, irrespective of ownership or such as attach to certain property in conjunction with its ownership by certain persons, will readily be conceded, and it is apparent that all exemptions of this character, must be covered by one of these two classes. Applying this rule the question arises, what was the nature of the privilege in the charter of the corporation of 1851?

The entire grant of the privilege is as seen above, by making all the engines, cars, wagons, machines, and other property belonging to said company, part of the capital stock of the company, vesting it in the shareholders of the company, and then exempting *the stock of said company* from the payment of all State and County taxes.

It will appear from this, that the privilege was one attaching to the property in conjunction with its ownership by a member of the corporation, and not in conjunction with its ownership by the corporation. The engines, cars, wagons, etc. were not specifically

exempt. Whenever the corporation parted with any of its property, such property undoubtedly became the object of taxation. The exemption attached to the stock, which *the corporation as such* could neither sell nor mortgage. The stock was property of the shareholders, and transferable by them alone according to the well settled rules of law, no less, than according to the express provisions of the charter. It attached to the value of the stock as represented by the value of the interest of all the stockholders in the corporate property. All the corporate property might be sold and the stock rendered comparatively of little value, but whatever value it had to that value, and to that value alone did the exemption attach.

Armstrong vs. Athens Co., 10 Pet. 282. Lord vs. Litchfield, 36 Conn., 116.

It is not claimed by this argument that the State was not prohibited from taxing the property of the corporation of 1851 while it remained part of the capital stock held by the shareholders of such corporation, but it is claimed that whenever a severance took place, and the property which the corporation as such could alien, was severed by such alienation from the capital stock which the corporation as such could not alien in any manner, that then the property became immediately an object of taxation.

It will be seen further, that while the cases of Hannibal & St. Joe R. R. vs. Shacklett, 30 Mo. 550, Bangor & P. R. R. vs. Harris, 21 Me. 534, and the Rome R. R. vs. Rome, 14 Ga. 276-7, which were cited by complainant in the Court below, as opposed to the above construction of this privilege—are not at all at war with that construction—the construction thus claimed by me is strenghtened by the language of this Court in Gordon vs. The Appeal Tax Court, 3 How. 150, where the Court defines the term *capital stock*, and distinguishes it from franchise as follows:

"The franchise is their corporate property, which like any other property, would be taxable if a price had not been paid for it, which the legislature accepted

as the consideration for allowing them to use the franchise during the continuance of their charters. *The capital stock is another property*, corporately associated for the purpose of banking, *but in its parts is the individual property of the stockholders in the proportions they may own them.* Being their individual property they may be taxed for it, as they may for any other property they may own."

If this proposition is correct, then the claim of complainant, and plaintiff in error, that the property of the corporation of 1867, is exempt from taxation, must entirely fail, because as shown by his bill, the only title which the corporation of 1867 does claim to have to this property, is derived from and through the corporation of 1851, and not from and through the stockholders of such corporation. The corporation of 1867 showing no title whatever to any of the capital stock of the corporation of 1851.

But even if the Court should be of opinion that the exemption from taxation as above set out, was a privilege belonging to the Corporation of 1851, and part of its franchises, that it was a privilege and franchise that could be aliened by the corporation as such without the consent and intervention of the stockholders, then I am prepared to show that such franchise or privilege was never aliened by that corporation, and that the corporation of 1867 can maintain no claim to have aquired it by transfer from or through the corporation of 1851.

It might be conceded that a Railroad Corporation might mortgage its franchise to carry passengers and freight for hire, if the public policy of the State permits it, and nothing in its charter forbids it. That it cannot mortgage or sell its franchise to be a corporation unless expressly thereto authorized by law, is too well settled to admit of any dispute.

Pierce, Am. R. R. Laws, page 520, note 1 &c.
Atkinson vs. Marietta &c. R. R. Co. 15 Ohio St. 21.
Stewart vs. Jones, 40 Mo. 140.

The Corporation of 1851 was authorized to execute two kinds of mortgages.

Laws of Mo. 1853, page 297 § 6.

First, by the sixth section of the act amendatory of its charter, approved February 17, 1853 it was authorized from time to time to borrow such sums of money as may be necessary (subject to the prior lien of the state, if any state bonds are loaned said Company) for the completion and extension of its railroad, and to issue and dispose of its bonds for any amount so borrowed, and to mortgage if necessary its corporate property or franchise or any part thereof to secure the payment of debts contracted for such purpose.

Next, it was authorized to mortgage *its road and every part and section thereof, and its appurtenances* to the State by the various laws recited in complainants bill, and there mentioned as acts granting aid of the State to the company—which acts reserved such statutory mortgage and were accepted by the company.

All these various acts granting State aid to the company refer for the terms of the loans and mortgage

Laws of Mo. 1851, page 265.

to "an act to expedite the construction of the Pacific Railroad and of the Hannibal and St. Joseph Railroad, approved February 22nd, 1851, the provisions of which, as far as they have any reference to the reservation of lien and power of sale are as follows:

Ibid. page 267.

"SECTION 3. No part of the said bonds shall be delivered to said companies, or either of them, until the acceptance thereof shall be signified to the Secretary of State, by the filing in his office of a certificate of such acceptance, under the corporate seal of the company thus accepting, and the signature of their president..

"SECTION 4. Each certificate of acceptance so executed and filed as aforesaid, shall be recorded in the said office of Secretary of State, and shall thereupon become and be, to all intents and purposes, **a mortgage of the road of the company** executing and filing their acceptance, as aforesaid, **and every part and section thereof, and its appurtenances,** to the people of this State, for securing the payment of the principal and interest of the sums of money for which such bonds shall from time to time be issued and accepted, as aforesaid.

Ibid page 268.

"SECTION 11. In case the said companies, or either of them, to which bonds shall as aforesaid be issued, shall make default in the pay-

ment of either interest or principal of the said bonds, or any part thereof, no more bonds shall thereafter be issued to such delinquent company, **and it shall be lawful for the Governor to sell their road and its appurtenances, by auction, to the highest bidder,** first giving at least six months' notice, of the time and place of such sale, by advertisement, to be published once in each week in the paper which shall publish the laws at Jefferson City, and in two public newspapers printed in the City of St. Louis; or to buy in the same at such sale for the use and benefit of the State, subject to such disposition in respect to such **road or its proceeds,** as the Legislature may thereafter direct."

I desire in this connection to call the attention of the court particularly to the fact that there is no claim in complainants bill that the corporation of 1867 acquired the road under a mortgage executed by virtue of the provisions of section six of the amendatory act of 1853, which authorized mortgages to other parties than the state, the only claim advanced is that it did acquire it under a sale made by the Governor to enforce the lien of the State created by the various acts granting State aid to the company.

I desire further to call the attention of the Court to the fact that the lien reserved by the State under all of these laws granting State aid to the company, is *only a lien on the road of the company and every part and section thereof, and its appurtenances,* that this lien is not extended anywhere to any of the franchises, privileges, or immunities of the company.

Will it be contended by the complainant that the franchises of the corporation of 1851, whose charter as he maintains was an inviolable contract between the State and the corporation, and as such beyond the power of interference, alteration or repeal by the legislature could be seized and sold without the consent of that corporation?—If so, his entire case which rests upon the inviololable character of this charter must fall.—If not so, then how can the corporation of 1867, derive title to the franchises of the corporation of 1851, through a sale made by the Governor of the State, which must be admitted to be illegal, because the cor-

poration of 1851, never in any manner accepted, or consented to, the provisions of the act, *to provide for the sale of certain railroads and property by the Governor, to foreclose the States lien thereon etc., approved February 19th 1866*, under which sale the corporation of 1867 claims title.

It will further appear, that while the statutory lien reserved by the State, did not in terms include a lien on the franchises of the corporation of 1851—any reservation of a lien by the State upon these franchises would have given to the State no additional security, and would in fact have been entirely devoid of meaning.—The State is the mother of all franchises, of all privileges and of all immunities.—If it sold the road and every part and section thereof and its appurtenances,—under the lien and power of sale clearly reserved,—to any purchaser, it could confer on that purchaser, whatever franchises, rights, privileges and immunities it chose to confer.—If it bought the tangible property itself, why then it possessed by virtue of its own sovereign power, all the rights, franchises and immunities necessary for its use and enjoyment, and was under no necessity of purchasing those.

Laws of Mo. 1855, page 107.
Charles Riv. Bridge versus Warren Bridge, 11 Pet. 420.
Richmond et. al. vs. Louisa R. R. Co. 13 How. 71.
Turnpike Co. vs. State, 3 Wall 210.

And this is true to the fullest extent, because the St. Louis and Iron Mountain Railroad Company of 1851, had no exclusive charter privileges to operate a Railroad between certain points. The State might have at any time, if it chose to do so, conferred the privilege and franchise of operating a railroad between the same points on any party, without a violation of the charter of the corporation and of course could confer it on the purchaser of the road.—Why then reserve a lien on property, which was inherent in the State. There was all the less reason for reserving a mortgage on the franchise, because the legislature at the time of the reservation of the lien, was in no way restricted by constitutional clauses, from granting special franchises, privileges and immunities to any one. The intention of

the parties, in framing and accepting these laws creating the mortgage, must receive its interpretation in the light of the then existing organic law of the State.

That this statutory mortgage, under which the sale was had was not intended to include or cover the franchises of the corporation of 1851, will still further appear from this. As above stated the corporation was authorized to execute mortgages *to other parties than the State.* The sixth section of the act of 1853, the provisions of which are above quoted expressly authorized it to mortgage to such third parties, *its corporate property or franchise.* This clearly shows that the word *franchise* was not accidentally, but intentionally omitted in the mortgage to the State, where it could give no additional security,—being inserted in the power to mortgage to third parties where it could and did give additional security.

Thus I claim to have shown that even if this privilege of exemption from taxation, was a franchise of the corporation of 1851, and one, which that corporation might have aliened without the intervention of the stockholders, yet never having mortgaged any of its franchises to the State, the State could not have aquired them at mortgage sale, nor sold them to the corporation of 1867, or any one else. That the State whenever it becomes a contracting party, can not exercise the control of a sovereign over the provisions of the contract, is too well settled to need argument. That the legislature might have granted similar franchises as those possessed by the corporation of 1851—to any purchaser at mortgage sale, or to any subsequent purchaser from the State—*unless it was at the time of making such grant constitutionally prohibited*, is readily conceded, but that it could not grant *the franchises of the corporation of 1851* to any one, unless it first repossessed them in some lawful manner, must be conceded on the other side.

Const. of Mo., Art. 1, Clause 16.
West River Bridge Co. vs. Dix., 6 How, 507.

And here the inquiry presents itself, Why could not the legislature, at the date of the mortgage sale of this road, and at the date of the subsequent sale made by the State, confer on the purchasers franchises similar to those possessed by the corporation of 1851? Undoubtedly it could, with this exception, however, that the privilege of immunity or exemption from taxation could form no part of the franchises so granted, *because at the date of said mortgage sale, for some time anterior thereto and ever since the Legislature was prohibited by the organic law of the State from conferring this privilege of immunity from taxation on any one.*

Const. of Mo., Art. 13, Clause 7.

The present constitution of Missouri became the organic law of the State on the 4th day of July, 1865.

Gen. St. 1865, p. 43.

The 16th section of the 11th article of that instrument provides:

"No property, real or personal, shall be exempt from taxation, except such as may be used exclusively for public schools, and such as may belong to the United States, to this State, to Counties, or to municipal corporations within the State."

Ibid. p. 32.

The 27th section of the 4th article of that instrument provides among other things:

"The General Assembly shall not pass any special laws * * * exempting the property of any named person or corporation from taxation."

The 4th section of the 8th article of that instrument provides:

"Corporations may be formed under general laws, but shall not be created except for municipal purposes by special acts."

The complainant claims title for the corporation of 1867, under the State, by virtue of three acts recited in his bill:

Laws of Mo. 1866, page 107.

First—An Act to provide for the sale of certain railroads and property by the Governor, to foreclose the State's lien thereon, etc.

Approved February 19, 1866.

Second—An Act authorizing the incorporation of the purchaser or purchasers of any railroad or of any part, section, or branch thereof, which has heretofore or may hereafter become forfeited to and sold by the State. Ibid. page 101.

Approved March 20th, 1866.

3rd. An act to confirm the title of the St. Louis and Iron Mountain Railroad to Thomas Allen, his heirs and assigns, and to deliver possession thereof to the St. Louis and Iron Mountain Railroad Company, organized as a corporation on the 29th day of July, 1867, etc. Laws of Mo. 1868, page 95.

Approved March 17th, 1868.

The date of the passage of each of these acts is subsequent to the date when the present Constitution whose provisions are above quoted, went into effect. For this reason, among others it is unnecessary to examine the provisions of said acts in detail,—whether it was the intention of the legislature to confer on the corporation of 1867 or on its stockholders, immunity from taxation or not becomes an immaterial inquiry in the light of the constitutional provision above quoted, which prohibited the legislature from making any such grant.—The second proposition then that the corporation of 1867, became possessed of this privilege of exemption by virtue of an original grant made to it by the legislature of the State of Missouri, must necessarily fail, because that the 16th section of the 11th article of the constitution above quoted, not only operated as a repeal of all exemptious theretofore existing, which could lawfully be repealed, but also operated as a prohibition on the legislature to grant further exemptions,—needs no argument.

The plaintiff in error makes no claim, that the property of the corporation of 1867, has not been subjected to taxation, by subsequent acts of the legislature, provided it could be lawfully subjected to taxa-

tion, and therefore I do not deem it necessary here to recite the particular provisions of the laws under which the assessment and levy complained of have been made.

I should rest in my argument here but for one fact.—It was seriously contended by complainants counsel in the court below and I have no doubt the point will be pressed here, that the constitutional restrictions on the legislature, were not, and are not applicably to sales made by the State of Railroads to which it had loaned its credit, and which it had bought and afterwards resold,—for the reason that the power of the legislature in those cases was expressly extended by *An Ordinance for the payment of the State and Railroad indebtedness*, which Ordinance was adoptedin convention on the eight day of April 1865, and became by its terms a part of the present constitution when ratified by the people.

Such parts of said ordinance, as can have any bearing whatever on this case are here set out as follows:

SECTION 1. There shall be levied and collected from the Pacific Railroad, the North Missouri Railroad Company, and the St. Louis and Iron Mountain railroad company, an annual tax of ten per centum of all their gross receipts for the transportation of freight or passengers (not including amounts received from and taxes paid to the United States) from the first of October, 1866 to the first of October 1868, and fifteen per centum thereafter,which tax shall be assessed and collected in the County of St. Louis, in the same manner as other State taxes are assessed and collected, and shall be appropriated by the General Assembly to the payment of the principal and interest now due, or hereafter to become due, upon the bonds of the State, and the bonds guaranteed by the State, issued to the aforesaid railroad companies.

SECTION 3. The tax in this ordinance specified shall be collected from each company hereinbefore named, only for the payment of the principal and interest on the bonds for the payment of which such company shall be liable; and whenever such bonds and interest shall have been fully paid, no further tax shall be collected from such company; but nothing shall be received by the State, in discharge of any amounts due upon said bonds, except cash or other bonds or obligations of this State.

SECTION 4. Should either of said companies *refuse or neglect to pay said tax as herein required, and the interest or principal of any of said bonds, or any part thereof remain due and unpaid*, the General Assembly shall provide by law for the sale of the railroad and other property, and the franchises of the Company that shall be thus in default, under the lien reserved to the State, and shall appropriate the proceeds of such sale to the payment of the amount remaining due and unpaid from said company.

"SECTION 5. Whenever the State shall become the purchaser of any railroad, or other property, or the franchises *sold as hereinbefore provided for*, the General Assembly shall provide by law in what manner the same shall be sold, for the payment of the indebtedness of the railroad company in default; but no railroad *or other property or franchises by the State, shall be restored to any such company* until it shall have first paid in money, or in Missouri State bonds, or in bonds guaranteed by this State, all interest due from said company; and all interest thereafter accruing shall be paid semi-annually in advance; and no sale or other disposition of any such railroad or other property, or their franchises, shall be made without reserving a lien upon all the property or franchises thus sold or disposed of, for all sums remaining unpaid; and all payments made therefor shall be in money, or in the bonds or other obligations of this State."

On the 27th of November, 1865, the then Governor of the State of Missouri, under the 11th section of the 6th article of the constitution, which provides that the "judges of the Supreme Court shall give their opinion upon important questions of constitutional law, and upon solemn occasions, when required by the Governor," etc., asked the then judges of the Supreme Court for their opinion as to the construction of said ordinance, and the judges gave their opinion to the Governor.—It was claimed by complainant below, that the judges in such opinion, give countenance to the claim, that this ordinance extends the constitutional power of the legislature, because they declare that the fifth section of this ordinance relates "to all sales of railroads under the liens reserved to the State, whether directed by the General Assembly, at their own discretion, under previous laws, and for the reason only that the company is in default to the State in respect to her bonds and interest, or in obedience to the command of the ordinance, for the reason that the company is in default both as to the tax and the bonds.'"

37 Mo. 131-135.

Now I respectfully suggest, that neither the ordinance itself, nor the opinion of the judges admits of any such construction.

Gen. Stat. of Mo. 1865, p. 45.

The Constitution as revised was adopted in Convention on the eighth day of April 1865,—simultaneously with this ordinance,—and when the Convention in the fifth section of this ordinance uses the term "the general assembly shall provide by law in what manner the same (the railroads) shall be sold"—it could have meant merely such law as the general assembly could make under the constitution.—To hold that this phrase gave to the general assembly power to make whatever law it saw fit to make touching the sale of such railroads,—regardless of constitutional restraints,—is not only contrary to all rules of correct interpretation,—contrary to the spirit of the whole section, which throughout restricts the power of the

legislature instead of extending it, but is also contrary to the opinion of the judges in construing the ordinance, they holding not only that the legislature derived no additional powers by the provisions of this ordinance, but on the contrary that its powers were restricted thereby in several important particulars.

Nor can the fact that the section at its close speaks of "*the sale or other disposition of any such railroad or other property or their franchises*, be held to authorize the legislature to grant or sell anything else except the "*railroad or other property or franchises purchased by the State*" under its lien of which mention is made in the beginning of the section.

Admitting then even, that the fifth section of that ordinance, has reference to and controls all sales made by the State of railroads of which it becomes the purchaser, and that the words "*hereinbefore provided for*" in the beginning of the fifth section, do not limit the operation of that section to sales had under the fourth, and what follows, that the legislature is authorized to provide by law for the sale of such railroad, other property and franchises of the company, which the State has purchased under the lien reserved—and nothing else.

To claim for this section that it authorizes the legislature to create by original grant such privileges and franchises, the grant of which is expressly prohibited by the constitution, is to claim for it a construction equally unsupported by its letter and spirit, and contrary to the opinion of the judges, who hold in their opinion, that the legislature must be governed in its disposition of railroads acquired by the State by the provisions of the Constitution. 37 Mo., 135.

"We are of the opinion that the thirteenth section of the eleventh article of the constitution of the State, does not authorize the State to receive in payment, for a railroad sold by the State preferred or other shares

of stock issued by a corporation purchasing such railroad."

To claim for this section, that because the judges say that the Legislature is *thereby* left unrestricted as to *time*, *terms* and *conditions* of sale,—that therefore the Legislature remains unrestricted by other provisions of the constitution and not only by this ordinance, —not only as to the time, terms and conditions of the sale,—but also as to the thing to be granted or sold, is to claim for it a construction which it does not admit of, and which neither the framers of the ordinance, nor the judges construing it, could ever have contemplated, and certainly have never expressed.

At the date of the passage of this ordinance, the State had not sold any of the roads under the lien reserved, and admitting even that the State could lawfully seize the franchises of the corporation of 1851, under the fourth section for non-payment of the tax as provided for in the first section of the ordinance, yet there is no pretense that this was ever done. The Legislature made provision for the sale of the road under the lien reserved by the statutory mortgage, in February 1866, and sold the road shortly thereafter, while the earliest date at which the tax under the provisions of the first section was even assessable, was October 1867, and the tax so assessed would not become delinquent under the then existing revenue laws of the State until December 1868.

Conceding however the most favorable construction that complainant can claim for this ordinance, conceding his claim that the recitals in it should estop the State from disputing the power of the Legislature, to grant franchises to the purchasers of these roads, and that if it could not grant the same franchises, because it had not repossessed them—it ought out of its own store and power grant similar franchises, and what follows.—That the Legislature could and should have granted to the purchasers of these roads

the franchise to be a corporation with all its incidents, the franchise to carry passengers and freight for hire on the road sold to them, all of which the Legislature actually did, not being restricted therein by the constitution, but it certainly does not follow, that the Legislature was bound to grant to them privilege and immunity from taxation, which it lawfully could grant to no one, being restricted therein by the constitution.

I shall not notice in this argument the claim which has been advanced, that the legislature by shortly thereafter passing the so-called sell-out act,—which claims to grant "privileges and immunities" to the purchasers of the roads, placed a legislative construction on the provisions of the constitution and ordinance, in which construction the Governor concurred,—and that this cotemporaneus interpretation is entitled to great weight, and may be relied on as establishing a rule of property. I shall not notice the claim so advanced for the sole reason, because if that rests upon sound propositions of law,—then indeed, all constitutional restrictions upon the power of the legislature go for naught, and all that would be necessary to entirely remove them, would be for the legislature, and the executive to defy them immediately after their enactment by the people.

Nor shall I notice the proposition advanced on the other side, that the legislature under the provisions of the constitution of 1865, had power to commute taxes on property, altough it had no power to exempt property from taxation, and that the exemption might be supported on the theory of commutation. That proposition bears its refutation in its bare statement. It is, I may say, it with all due courtesy to counsel on the other side, a proposition of law untenable in itself, applied to a state of facts that do not exist in this case. Where the legislature was unrestrained by constitutional provisions, such contracts of commutation have been upheld, on the same theory as contracts of ex-

emption, but I venture to say no well reasoned case can be found either in this court or out of this court, where a contract of commutation was held good, although the legislature had no power to exempt, as such holding would at once annihilate all constitutional restraint on the subject. Besides, any such theory was expressly negatived by the Supreme Court of Missouri, in Life Association of America vs. Board of Assessors. 49 Mo. 521-522.

I cannot close however without calling the attention of the court to another feature of this case which has not heretofore been discussed.

The theory of the inviolable character of all these exemptions, is that they rest upon contract, and that there is some consideration to support that contract which the State deemed an equivalent for the relinquishment of its sovereign right. This certainly presupposes the continued identity of the thing exempted from the burden to a ceriain extent at least. No one will claim that a corporation whose capital stock is limited by law to ten thousand dollars, possessing exemption from taxation for its capital stock,—could transfer its stock and franchises (even if it had power to do so) to another corporation whose capital stock was one million of dollars. and that thereby the second corporation would secure immunity from taxation for its entire capital stock of one million and ten thousand dollars. Such claim was attempted and was negatived by a recent decision of this court. And yet beyond all other obstacles, above spoken of even this obstacle is sought to be overcome in this case, as will appear from the following.

The capital stock of the St. Louis and Iron Mountain Railroad Company incorporated in 1851, was limited by its charter to six millions of dollars—and could be increased only on certain conditions which were not complied with,—within the time mentioned in the charter,—so that the capital stock became ab-

solutely limited to that sum—long anterior to the sale of the road, and the adoption of the present constitution. There was even no provision in the general corporation law of either 1845, or of 1855, permitting corporations to increase their capital stock, of which that corporation might have availed itself.

The capital stock of the corporation of 1867 is limited by the act authorizing the incorporation of the purchaser or purchasers of any railroad etc., approved March 20th 1866, under which act, as complainants bill states the corporation was formed, to ten millions of dollars and may at any time be doubled in the manner provided by Section 2, Chapter 62, of General Statutes of 1862, p. 127. Laws of Mo. 1866, page 102, § 2.

That Section provides:

"Any private or public corporation may increase its capital stock to any amount not exceeding double the amount of their authorized capital, by holding an election of the stockholders in conformity with the by-laws thereof, and if at such election a majority of the stockholders shall vote for the increase of the stock, the same may be increased by a vote of the Board of Directors, Trustees, or other business managers of such corporation; and upon such increase of stock being made, in accordance with the by-laws, the date, amount and subscriptions for such new stock shall be returned to the office of the Secretary of State, and from the time the same is filed, the increase of stock shall become a part of the capital thereof.

Sec. 3. The powers enumerated in the preceding section, shall vest in every corporation that shall hereafter be created or organized.

Thus it will be seen that the identity of the thing exempted is entirely destroyed even as to amount. The exemption at the date of the sale attached to six millions of dollars in value at the utmost. The exemption attempted to be granted after 1865 by the

Legislature may attach to twenty millions. Nay, it might have attached to an unlimited amount, according to complainant's claim, because if the Legislature had power to limit the stock of the new corporation to to ten or twenty millions, it might by the same power leave it entirely unlimited. And yet appellant claims that *all* the property of the corporation of 1867, is exempt from taxation, and by his own submission must fail unless all is exempt.

I have endeavored to show in the preceding argument:

1. That the privilege of exemption in the charter of the St. Louis and Iron Mountain Railroad Company of 1851, was of that character, that it protected the property only while it formed part of the capital stock, and that the severance of the property from the stock subjected the former to taxation at the pleasure of the State.

2. That even if the privilege was one which the corporation could alien without the intervention of the stockholders, yet that it never was so aliened even by the corporation, and therefore could not have been acquired by complainant's corporation, but still attaches to the stock and property, if any, of the corporation of 1851.

3. That if the corporation of 1851 was possessed of an irrepealable charter, its franchises could not be seized by the State, and transferred by the legislature to any other party or parties, the legislature being therein restricted by the old and the new constitution of the State alike, and the State being therein restricted by the constitution of the United States.

4. That while there was nothing to prevent the legislature of the State of Missouri to grant to any purchaser of the railroad franchises similar to those of the corporation of 1851—it could not grant immunity from taxation, being therein restricted by the constitution of the State.

5. That even if all these obstacles could be overcome, yet there is an entire want of identity, of the property exempted in the charter of 1851—and the property of the corporation of 1867.

And having endeavored to show all these I cannot close in a more fitting manner, than by quoting the language of the great chief justice which has so often been re-asserted by and met with the approbation of this court.

"That the taxing power is of vital importance, that it is essential to the existence of government are truth which it cannot be necessary to re-affirm, they are acknowledged and asserted by all. It would seem that the relinquishment of such a power is never to be assumed. We will not say that a State may not relinquish it, that a consideration sufficiently valuable to induce a partial release of it may not exist, but as the whole community is interested in retaining it undiminished, that community has a right to insist, that its abandonment ought not to be presented in a case, in which the deliberate purpose of the State to abandon it does not appear."

All of which is respectfully submitted.

R. E. ROMBAUER,

Solicitor for Respondent Maguire.

BRIEF AND POINTS,

MADE BY

R. E. ROMBAUER,

FOR

CONSTANTINE MAGUIRE, RESPONDENT.

I. The taxing power of a State being of vital importance and essential to the existence of the Government, is never presumed to be relinquished, unless the intention to relinquish it is expressed in clear and unambiguous terms.

Providence Bank vs. Billings 4. Pet. 514, 561.

Phil. & Wilmington R. R. vs. Delaware 10. How. 376.

Gordon vs. Appeal Tax Court—3. How. 133.

Jefferson Branch Bank vs. Skelly—1 Black 447.

East Saginaw Manufacturing Co. vs. City of East Saginaw. 13 Wall. 373.

Gilman vs. Sheboygan—2 Black 513.

Christ Church vs. Philadelphia—24 How. 300.

II. The St. Louis and Iron Mountain Railroad Company incorporated March 3d 1851, possessed no privilege of exemption from taxation for any other property than its capital stock, and its other property while it formed part of such capital stock. The capital stock was by the terms of the charter vested in the stockholders and transferable by them alone. Any alienation of the property of the corporation, by the corporation by which the property became severed from the capital stock, subjected the property to the sovereign taxing power of the State.

Charter of the St. Louis and Iron Mountain R. R. amendment of 1853, sec. 5. Railroad laws p. 48.

Charter of St. Louis and Belleview Mineral R. R. Section 24. Railroad laws pages 46, 47.

Armstrong et al vs. The Treasurers of Athens Co., 10 Pet. 282.

Town of New Haven vs. Sheffield, 30 Conn. 160.

Lord vs. Town of Litchfield, 36 Conn. 116.

III. The privilege of exemption even if it was a privilege of the corporation as such, is still held by the St. Louis and Iron Mountain Railroad Company of 1851, because that corporation still exists.

A corporation is not dissolved by a sale of all of its corporate property, and a settlement of all its concerns, or by a cessation of all corporate acts, or by any neglect of corporate duty —or by doing acts which cause a forfeiture of the charter, without judgment declaring such forfeiture. Such dissolution can take place only—

By an act of the legislature where power is reserved for that purpose.

By a surrender of the charter which is accepted.

By a loss of all its members or an integral part.

By forfeiture which must be declared by judgment of court.

Penobscot Boom Co. vs. Lansom, 16 Me. 224.
Slee vs. Bloom, 5 Johns. Chy. 379.
Revere vs. Boston Copper Co. 15 Pick. 351.
Boston Glass Co. vs. Langdon, 24 Pick. 49.
Atkinson vs. Marietta R. R. Co. 15 Ohio St. 21.
Stewart vs. Jones, 40 Mo. 440.

The corporation could not be dissolved by an act of the legislature here—as no power was reserved, the charter of the corporation being irrepealable.

The corporation did not surrender its charter to the State, because the descriptive words—" the road of the company and every part and section thereof and its appurtenances, can bear no such interpretation.

Ordinary vs. Central R. R. et al 40 Geo. 647.
New York & Erie R. R. vs. Sabin, 2 Casey 242.
Atkinson vs. Marietta R. R. 15 Ohio St. 21.
Coe vs. Columbus R. R. 10 Ohio 372.

Because a reservation of the lien upon all or any of the franchises of the company by the State would have been entirely devoid of meaning and could not have been intended, as the corporation possessed no exclusive right to operate a railroad between certain points.

Charles River Bridge vs. Warren Bridge, 11 Pet. 420.
Richmond R. R. vs. Louisa R. R. 13 How. 71.
Turnpike Co. vs. State, 3 Wall. 210.

By the descriptive words of the mortgage not even all the tangible property passed to the State, but only such as was necessary for the convenient use of the road.

4 Kent. 467.
1 Bouvier Law. Dict. 136.
1 Burrills Law. Dict. 84.
2 Rev. Stat. Mo. 1855 p. 1026, Sec. 22.
Ivy vs. The Jackson and Michigan Plank Road.
11 Mich. 155, 173.
State of Missouri vs. McKay et al 43 Mo. 594.

IV. The St. Louis and Iron Mountain Railroad Company of 1867, being another and different corporation from the corporation of that name of 1851, and not having acquired the franchises and privileges by a voluntary transfer from the latter corporation,—could have acquired no immunity from taxation by original grant from the legislature of the State of Missouri, as the legislature had no power to make such grant after the 4th day of July 1865.

Section 16. Art. 11. Constitution of 1865 of Missouri.
Section 4 Art. 8 " " " " "
Section 27 Art. 4 " " " " "
Atkinson vs. the Marietta and Columbus R. R. 15 Ohio Stat. 21.
Life Association of America vs. Board of Assessors, 49 Mo. 521, 522.

The ordinance for the payment of State and Railroad indebtedness, even if it should be held to apply to sales other

than forthe nonpayment of tax provided in its 4th Section does not extend but restrict the power of the legislature, in the sale of Railroads.

Gen. Statutes 1865, p.p. 52, 53.
Opinion to Governor 37 Mo. 133, 134, 135.

V. There is no identity whatever between the thing exempted from taxation by the charter of 1851—and the thing sought to be exempted from taxation by virtue of the acts of the legislature of February 1866 and subsequent.

That the corporation is not the same stands admitted by the bill.

That the thing exempted is not the same, appears by the two charters.

Laws of Mo. 1851 p. 479 Sec. 1.
Revised Statutes 1845.—Titte Corporations.
" " 1855 " "
Laws of Mo. 1866 p. 102 Sect. 2.
Gen. Stat. of Mo. 1865. p. 127, sec. 2.

And unless all the property of the corporation of 1867 is exempt, the judgment ought to be affirmed. Appellants statement, p. 7.

R. E. ROMBAUER,
Solicitor for Respondent Maguire.

It is claimed by complainant's counsel that section 17 of an act to amend an act to secure the completion of certain railroads in the State, and for other purposes—approved December 10th, 1855, by using the word *property* includes all franchises, but this construction, I contend, is a very strained construction, and not in harmony with the entire legislation on this subject. That section is as follows:

"SECTION 17. All bonds issued under the pro-
" visions of this act, shall constitute a first lien or
" mortgage upon the road and property of the several
" companies so receiving them *in the same manner, as*
" *provided by the act, approved February 22nd, 1851,*
" *to expedite the construction of the Pacific Railroad*
" *and of the Hannibal and St. Joseph Railroad.*"

I desire to say further, that even if the word property in the 17th section could be construed to include the franchises of the company—yet the only foreclosure by sale which is provided by law, and to which the corporation of 1851 is a party by accepting the terms of the law, is the foreclosure provided by the act of February 22nd, 1851, which is above set out in full, and which provides that it shall be lawful for the Governor to sell "*the road and its appurtenances*," and nothing else.